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8 BIORX, LLC

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Case No. 2:08-cv-01252-WBS-EFB

13 Plaintiff, Complaint filed June 4, 2008

14 v.
15 BIORX, LLC, an Ohio Limited Liability
Company,
16

**DEFENDANT BioRX, LLC'S OBJECTIONS
TO EVIDENCE SUBMITTED BY
PLAINTIFF IN SUPPORT OF ITS REPLY
TO MOTION FOR PRELIMINARY
INJUNCTION**

Defendant. DATE: August 18, 2008
TIME: 2:00 p.m.
CRTM: 5

20 Defendant BioRx, LLC ("BioRx") hereby submits the following evidentiary objections to
21 the evidence cited below and filed by Plaintiff Nutrishare, Inc. ("Plaintiff") in connection with the
22 reply in support of its Motion for Preliminary Injunction. BioRx hereby requests and moves that
23 the Court sustain its objections and strike the evidence on the grounds set forth below:

24 I. DECLARATION OF ELLEN J. TENUD IN SUPPORT OF REPLY

25 BioRx objects generally to the declaration of Plaintiff's paralegal, who is not an
26 independent expert but rather the mouthpiece of her employer (plaintiff's counsel of record), who
27 apparently has never worked at the Patent and Trademark Office and therefore has no knowledge

1 of their practices and procedures. Ms. Tenud's declaration is nothing more than the argument of
 2 plaintiff's counsel masquerading as "testimony."

3 **Objection #1:**

4 Testimony: P. 2, lines 7-8, "The Examiner conducted an identical search in each case."

5 Ground(s) for objection: FRE 602, lack of personal knowledge; FRE 701, Improper
 6 opinion testimony of a lay witness; FRE 802 (the witness is a paralegal employed by plaintiff's
 7 counsel, not an independent expert, has no experience actually working at the Patent and
 8 Trademark Office and therefore lacks the qualifications to testify as an expert regarding the
 9 practices and procedures of the PTO).

10 **Objection #2:**

11 Testimony: P. 2, lines 6-8, "Based on my experience and in my opinion, the Examiner
 12 would not have uncovered or been aware of the registered Nutrishare trademark based on the
 13 search query."

14 Ground(s) for objection: FRE 602, lack of personal knowledge; FRE 701 about what the
 15 Examiner uncovered or was aware of; Improper opinion testimony of a lay witness; FRE 802 (the
 16 witness is a paralegal employed by plaintiff's counsel, not an independent expert, has no
 17 experience actually working at the Patent and Trademark Office and therefore lacks the
 18 qualifications to testify as an expert regarding the practices and procedures of the PTO).

19 **Objection #3:**

20 Testimony: P. 2, lines lines 9-10, "Specifically, the Examiner only reviewed marks that
 21 contained the letters 'n(v)tr' and 'thr(v:)2)v'."

22 Ground(s) for objection: Ground(s) for objection: FRE 602, lack of personal knowledge
 23 (no personal knowledge that the Examiner "only reviewed" what was disclosed in a public
 24 database).

25 **Objection #4:**

26 Testimony: P. 2, lines 15-17, "As can be ascertained from the listing of marks, Nutrishare
 27 was never before the Examiner or considered during the Examiner's analysis of the registrability
 28 of the NutriThrive marks."

1 Ground(s) for objection: FRE 602, lack of personal knowledge about what was before the
 2 Examiner or considered by the Examiner; FRE 701, Improper opinion testimony of a lay witness;
 3 FRE 802 (the witness is a paralegal employed by plaintiff's counsel, not an independent expert,
 4 has no experience actually working at the Patent and Trademark Office and therefore lacks the
 5 qualifications to testify as an expert regarding the practices and procedures of the PTO).

6 **II. DECLARATION OF RODNEY OKAMOTO IN SUPPORT OF REPLY**

7 **Objection #5:**

8 Testimony: P. 2, line 8, ""on July 2, 2008, Mr Cesar did tell me that both he and the
 9 ACHC's Director of Accreditation, Sherry Hedrick, believed that the 'NutriThrive' and 'Nutrishare'
 10 names were very similar, that the public was likely to be confused between the 'NutriThrive' and
 11 'Nutrishare' name, and that it was not in the best interest of the public to be confused."

12 Ground(s) for objection: FRE 802, hearsay; FRE 701, Improper (hearsay) opinion
 13 testimony of a lay witness (*i.e.*, improper hearsay regarding the purported opinion of Mr. Cesar and
 14 Ms. Hedrick).

15 Dated: August 13, 2008

ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP

16 By: _____ s/ Amy Wintersheimer Findley

17 AMY WINTERSHEIMER FINDLEY
 18 MICHAEL R. ADELE
 19 CHARLENE J. WILSON
 Attorneys for Defendant
 BioRx, LLC

1 **CERTIFICATE OF SERVICE BY ECF**

2 I am employed in the County of San Diego, State of California. I am over the age of 18
 3 and not a party to the within action. My business address is 501 West Broadway, 15th Floor, San
 Diego, California 92101.

4 On August 13, 2008, I electronically filed:

- 5 • **DEFENDANT BIORX, LLC'S OBJECTIONS TO EVIDENCE
 6 SUBMITTED BY PLAINTIFF IN SUPPORT OF ITS REPLY TO
 MOTION FOR PRELIMINARY INJUNCTION**

7 Said document(s) is/are available for viewing and downloading from the Court's ECF System and
 8 said document(s) was/were served upon all interested parties listed below in the manner indicated.

9 **Via CM/ECF System**

10 Michael John Thomas, Esq.
 11 Aparna Rajagopal-Durbin, Esq.
 DOWNEY BRAND LLP
 12 555 Capitol Mall, 10th Floor
 Sacramento, CA 95814-4686

13 Attorneys for Plaintiff
 NUTRISHARE, INC.
 Telephone: (916) 444-1000
 Facsimile: (916) 444-2100

14 I declare under penalty of perjury under the laws of the State of California that I am
 employed by a member of the bar of this Court and that the foregoing is true and correct.

15 Executed on August 13, 2008, at San Diego, California.

16 _____
 Susan L. Pierson
 17 (Type or print name)

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 Susan L. Pierson
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 (Signature)